IN THE

# Supreme Court of the United States

OCTOBER TERM, 1940.

No. 418

RAYMOND R. SMITH, AS RECEIVER OF NORTHERN INDIANA RAILWAY, INC., NORTHERN INDIANA RAILWAY, INC., AND GIRARD TRUST COMPANY, AS TRUSTEE,
*Petitioners,*

*against*

ABBOTT LAWRENCE MILLS,
*Respondent.*

## PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF.

RAYMOND R. SMITH, as Receiver of Northern Indiana Railway, Inc.,
By ORLO R. DEAHL,
*Counsel for said Petitioner.*

SEEBIRT, OARE & DEAHL,
*Of Counsel for Raymond R. Smith, Receiver.*

NORTHERN INDIANA RAILWAY, INC.,
By AL. W. JOHANNES,
*Counsel for said Petitioner.*

GIRARD TRUST COMPANY, as Trustee,
By S. J. CRUMPACKER,
*Counsel for said Petitioner.*

PARKER, CRABILL, CRUMPACKER, MAY, CARLISLE & BEAMER,
*Of Counsel for Girard Trust Company, Trustee.*

THE GUNTHORP-WARREN PRINTING COMPANY, 310 WEST JACKSON, CHICAGO

## INDEX.

TABLE OF CASES CITED.

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1940.

---

No. .....

---

RAYMOND R. SMITH, AS RECEIVER OF NORTHERN INDIANA RAILWAY, INC., NORTHERN INDIANA RAILWAY, INC., AND GIRARD TRUST COMPANY, AS TRUSTEE,

*Petitioners,*

*against*

ABBOTT LAWRENCE MILLS,

*Respondent.*

---

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

---

*To the Honorable Charles Evans Hughes, Chief Justice, and the Associate Justices of the Supreme Court of the United States:*

Petitioners, Raymond R. Smith as Receiver of Northern Indiana Railway, Inc., Northern Indiana Railway, Inc., and Girard Trust Company, Trustee, respectfully pray that a writ of certiorari issue to review the judgment entered January 22, 1940 in the United States Circuit Court of Appeals for the Seventh Circuit (R. 144-152) in the above entitled cause affirming the judgment of the District Court of the United States for the Northern District of Indiana dismissing plaintiff's suit for lack of jurisdiction, and the

supplemental judgment entered June 28, 1940 reversing the judgment of said District Court and mandating said District Court to grant plaintiff the relief prayed for (R. 154-156).

Your petitioners respectfully show:

## I.

### Summary Statement of the Matter Involved.

The Chicago, South Bend & Northern Indiana Railway Company, an Indiana corporation operating a street railway system in South Bend, Indiana, was adjudged insolvent in 1927 in a creditor's suit in the United States District Court and a Receiver was appointed for it; trustees for three mortgages intervened and filed complaints to foreclose their mortgages; the petitioner, Girard Trust Company, trustee under a first mortgage prior in date and lien to said three mortgages, was not a party (R. 125). The Receiver operated the railway under the orders of said Court. On February 19, 1928 plaintiff Abbott Lawrence Mills suffered an injury in a collision with one of the street cars operated by said Receiver and on July 1, 1928 brought suit in a state court of Indiana to recover damages for said injury (R. 106). On November 9, 1929 said District Court entered a decree foreclosing said three mortgages and ordering sale of all the property of said Company subject to the mortgage of the Girard Trust Company, Trustee (R. 103-106).

Said decree gave said three mortgagees judgments for sums totalling $3,970,244.56, ordered all the property of said company sold, and that all rights, titles and interests of all the parties, and their respective creditors shall forever be barred (R. 102).

Said decree set out 23 judgments for injuries to persons

and property and adjudged that they were allowed as junior, inferior and subsequent to the liens of said three mortgages (R. 103 (d) ). Plaintiff did not in any way intervene in said receivership proceedings and no specific reference was made to his claim (R. 125). Said decree also allowed claims of creditors in the sum of $146,976.70 as preferred claims to be paid out of net income from operation during six months prior to the appointment of the Receiver (R. 103).

The decree further provided:

(1) All liability for negligence claims not now reduced to judgment against said Company or its receiver, "shall be valid as against the property of said railway company, at the sale ordered made to the same extent as though any judgment thereon had been recovered prior to the sale (R. 103(f) ).

(2) For the purpose of enforcing the provisions of this decree jurisdiction of this cause is retained by this court, and the court reserved the right to retake and resell the property in case such purchaser or his successors and assigns shall fail to comply with any order of the court in respect to the payment of such principal indebtedness or liabilities within thirty days after service of a copy of such order, or if an appeal be taken from any such order within a period of twenty days after the service of notice of the entry of the order finally affirming such order on appeal (R. 103(g) ).

(3) Notice having been heretofore given pursuant to orders of this court requiring all creditors to file claims and demands, and the time for such filing heretofore fixed having expired, all claims and demands which have not already been filed pursuant to the orders hereinabove made as aforesaid other than (1) all claims for deficiencies of the trustees under the mortgages foreclosed or enforced by

this decree in respect of the bonds issued under such mortgages, (2) any claims which may accrue after the entry of this decree and/or which may thereafter be proved *nunc pro tunc* by permission of this court, and (3) any claims in respect of the mortgages subject to which the property herein directed to be sold is sold, or in respect of any bond or obligation issued under said mortgages, shall be finally barred and foreclosed, and no such claim so barred or foreclosed shall be enforced against the receiver or against assets in the hands of the receiver or against the property sold or any portion thereof or against the purchaser thereof or any part thereof, nor shall the holder of any such claim or demand be entitled to the benefits of any right whatsoever under this decree, nor shall any such claim or demand be entitled to the benefits of any right whatsoever under this decree, nor shall any such claim or demand be entitled to share in the distribution of any of the proceeds of sale of the property directed by this decree to be sold or of any other funds or property distributable in the above entitled causes or any of them (R. 104(h) ).

(4) Any such purchaser or purchasers, or their successors or assigns, shall have the right to enter his or their appearance in this court and contest any claim, demand or allowance existing at the time of the sale, and then undetermined, or any claim or demand which thereafter may arise or be presented, which shall be payable by such purchaser or purchasers, or his or their successors or assigns, or which would be chargeable against the property purchased in addition to the amount bid at the sale, and any claimant or purchaser may appeal from any decision relating to such claim, demand or allowance (R. 104(i) ).

(5) All questions not herein disposed of are hereby reserved for future adjudication, including all questions as to the amount of income received within six months prior to the appointment of such receiver and during the re-

ceivership period, and now impounded and subject to said respective mortgages or not so impounded, and the court retains jurisdiction of this cause and of the property affected in this decree for the purpose of finally disposing in term time or vacation, of all such questions and matters; and any party to this cause as well as any purchaser, his successor or assigns may apply at the foot of this decree to this court for further order and directions (R. 105(l) ).

The order of court of February 11, 1930 confirming the sale provided, among other things:

(1) That the sale was made in conformity to the order (R. 107).

(2) The receiver's report of sale is in all things confirmed as final and absolute, subject, however, to all the terms and conditions of the decree and to all the rights and authorities reserved to said purchasers and to their assigns and to this court in and by the decree and by this order (R. 108(b) ).

(3) This court expressly retains a paramount lien and charge upon, and jurisdiction of, the property sold at said sale as against all provisions of the decree and of this order, and the power to retake said property, or any part thereof, sold under the decree and apply it to the satisfaction of any unpaid balance of the purchase price in case the company shall fail to pay the same (a) in accordance with the provisions of this order, or (b) in accordance with the provisions of any other order of the court directing such payment within thirty days after the service of a copy of such other order, or if an appeal be taken from this order or from any such other order, within twenty days after service of notice of the entry of the order finally affirming any such order on appeal (R. 108).

(4) Upon the production of the deed the grantee shall be let into possession of the property conveyed, and the

receiver shall deliver possession to the grantee, and after delivery of possession, the grantee shall hold, possess and enjoy the property so conveyed free from any charge or claim in respect of the receiver's indebtedness, and free from the trust and lien of said three mortgages so foreclosed, and free from all liens, claims, rights, interests or equity of redemption of, in and to the same by or of Chicago, South Bend & Northern Indiana Railway Company, or by or of all persons claiming by, under or through said last named company, its creditors or its stockholders, and by or of all parties to the above entitled causes, or any of them, subject to compliance by the grantee with all the terms and conditions imposed by the decree, this order and said deed. Upon delivery of the deed said Northern Indiana Railway, Inc. shall be entitled to receive all cash, accounts receivable and supplies in the hands of the receiver at the time of sale to the extent provided by the decree (R. 108(j) ).

(5) All questions not by the decree or hereby disposed of are hereby reserved for future adjudication (R. 109).

Before October 30, 1930 said Receiver filed in said receivership proceedings his final report and asked for his discharge. Said report showed that he had divested himself of all property of said railway corporation (R. 110). On October 30, 1930 said report was approved by the Court and said receiver was unconditionally discharged (R. 111).

On October 30, 1930 trial was begun in the action brought by plaintiff Mills; verdict for $12,500.00 was returned on November 5, 1930, and judgment was rendered upon said verdict on December 22, 1930; the receiver appealed from said judgment without bond, and there was no stay on said execution; the Appellate Court of Indiana affirmed said judgment April 26, 1933 and the

Supreme Court denied a transfer of said cause on April 26, 1934 (R. 125).

The property so purchased by the petitioner Northern Indiana Railway, Inc., was operated by it until December 28, 1931 when in a creditor's suit a receiver was appointed for it by the St. Joseph Circuit Court, and since that time the property has been operated by said receiver and said St. Joseph Circuit Court through its said receiver has had possession of all of said property (R. 111-115). Raymond R. Smith was appointed Receiver by said court; he is the same person who was appointed Receiver of Chicago, South Bend & Northern Indiana Railway Company by the United States District Court in 1927 (R. 126).

On June 22, 1933 the Receiver of Northern Indiana Railway, Inc., filed his petition in the St. Joseph Circuit Court to fix a time for the filing of claims against said corporation; and on said day said court by its order fixed September 15, 1933 as the time before which any and all persons holding or claiming to hold any claim or lien against the corporation's property should file their written claim with the Receiver. Notices were published of the requirements of said order. It was further ordered that claims or liens not so filed were barred (R. 113-5). That the plaintiff never filed any claim with the Receiver, but on September 12, 1933 he did file in said court in the suit of said receivership his petition to preserve what is denominated as a Federal lien based upon his alleged judgment obtained in the State Court (R. 115-8).

Also on March 7, 1935 said plaintiff filed in said receivership proceedings in the St. Joseph Circuit Court his objection to a distribution of the proceeds of sale of abandoned property to the mortgagees (R. 118-21). That

neither said petition or objection has ever been submitted to the St. Joseph Circuit Court (R. 120).

The plaintiff filed this action in the District Court on February 14, 1936 (R. 127).

## II.

### Reasons Relied On for the Allowance of the Writ.

### A.

The decision of said Circuit Court of Appeals upon the question that a judgment rendered only against a Receiver and after his discharge is not void, is in conflict with the decision of the Circuit Court of Appeals of the Eighth Circuit on the same matter, in the case of *Shepherd* v. *St. Louis Public Service Company,* 64 Fed. (2nd) 612.

### B.

The decision of said Circuit Court of Appeals upon the question that a judgment rendered only against a Receiver and after his discharge is not void, is in conflict with the applicable decisions of this Court.

### C.

The decision of said Circuit Court of Appeals upon the question that a judgment rendered only against a Receiver after his discharge and after all the trust property in his hands has been distributed under the order of the court is void, is a decision of an important question of local law, and in a way that is in conflict with local decisions.

D.

The decision of the Circuit Court of Appeals that the decree of the District Court foreclosing the mortgages and ordering a sale of the property of Chicago, South Bend & Northern Indiana Railway Company, and the judgment for plaintiff against said Company's Receiver, cast a lien upon the property in the possession of the purchaser, Northern Indiana Railway, Inc., at the sale held before the rendition of said judgment, and without the purchaser being made a party to any of said proceedings, is a decision of an important question of local law in a way that is in conflict with applicable local decisions.

E.

The decision of the Circuit Court of Appeals that notwithstanding the facts that the receiver of Chicago, South Bend & Northern Indiana Railway Company was unconditionally discharged on October 30, 1930, and that a receiver for the purchaser, Northern Indiana Railway, Inc., was appointed on December 28, 1931 by the St. Joseph Circuit Court, a state court, in which its property and affairs were being administered in an equity receivership from that time until and after February 14, 1936 when plaintiff brought the instant suit, nevertheless that a United States Court could again retake possession and by its decree fasten a lien upon said property, and thus interfere with the jurisdiction of said St. Joseph Circuit Court in the administration of said receivership, is in conflict with the decision of the Circuit Court of Appeals for the Eighth Circuit in the case of *Field* v. *Kansas City Bonding Co.*, 9 Fed. (2nd) 213, and is in conflict with decisions of this Court in the case of *Lion Bonding Co.* v. *Karatz,* 262 U. S. 77 and other cases therein cited.

F.

The decision of the Circuit Court of Appeals erroneously holds that plaintiff has a lien upon the property sold at the receiver's sale. The judgment of the State Court could not deal with the property or impress any lien thereon; it merely determined the existence and amount of the claim. The foreclosure judgment of the District Court did not create any lien; it provided that "all liability for negligence claims not now reduced to judgment shall be valid as against the property of said railway company at the sale herein ordered made *to the same extent as though any sale thereon had been recovered prior to the sale.*" If the judgment against the receiver had been recovered prior to the sale, obviously it would not have given the plaintiff a lien upon the property, it would have merely determined the amount of the claim. The foreclosure decree required every such judgment whether procured before or after the sale to be brought to the District Court by way of intervention in the receivership proceedings. Said decision is in conflict with the decision of this Court in *Riehle* v. *Margolies,* 279 U. S. 218.

G.

The decision of the Circuit Court of Appeals that the plaintiff's "judgment is a valid adjudication against the parties defendant in this proceedings" is a determination as to the petitioner, Girard Trust Company, Trustee, that plaintiff secured a lien superior to its mortgage in a legal proceedings to which said Girard Trust Company, Trustee, was not a party, and in which it did not appear or intervene; that said decision is a taking of said petitioner's property without due process of law in violation of the Fifth Amendment to the Constitution of the United States.

## III.

Your petitioners present to the Court and file herewith as an exhibit hereto a duly certified transcript of the entire record in the case, as the same appears in the United States Circuit Court of Appeals.

WHEREFORE, your petitioners respectfully pray that a writ of certiorari issue out of and under the seal of this Honorable Court, directed to the Circuit Court of Appeals for the Seventh Circuit, commanding that court to certify and send to this Court, on a day to be designated, a full and complete transcript of the record and all proceedings in said Circuit Court of Appeals had in this cause, to the end that this cause may be reviewed and determined by this Court; that the judgment of the Circuit Court of Appeals be reversed, and that your petitioners may have such other and further relief in the premises as to this Court may seem appropriate.

RAYMOND R. SMITH, as Receiver of
Northern Indiana Railway, Inc.,
By ORLO R. DEAHL,
*Counsel for said Petitioner.*

SEEBIRT, OARE & DEAHL,
*Of Counsel for Raymond*
*R. Smith, Receiver.*

NORTHERN INDIANA RAILWAY, INC.,
By AL. W. JOHANNES,
*Counsel for said Petitioner.*

GIRARD TRUST COMPANY, as Trustee,
By S. J. CRUMPACKER,
*Counsel for said Petitioner.*

PARKER, CRABILL, CRUMPACKER,
MAY, CARLISLE & BEAMER,
*Of Counsel for Girard*
*Trust Company, Trustee.*

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1940.

---

No. .....

---

RAYMOND R. SMITH, AS RECEIVER OF NORTHERN INDIANA RAILWAY, INC., NORTHERN INDIANA RAILWAY, INC., AND GIRARD TRUST COMPANY, AS TRUSTEE,
*Petitioners,*

*against*

ABBOTT LAWRENCE MILLS,
*Respondent.*

---

## BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

---

### The Opinions of the Court Below.

The opinion of the Circuit Court of Appeals affirming the judgment of the District Court in dismissing the plaintiff's suit is printed at pages 144-152 of the record.

The opinion of said Court in reversing the judgment of the District Court is printed at pages 154-156 of the record.

### Jurisdiction.

Application is made under Section 240 of the Judicial Code, as amended by the Act of February 13, 1925 (43 Stat. 938, Sec. 1; 28 U. S. C. A. 347) for a writ of certiorari to review a final judgment against the petitioners by the Cir-

cuit Court of Appeals for the Seventh Circuit on June 28, 1940 (R. 154-156). The first judgment of said Court was entered January 22, 1940, to which these petitioners filed a petition for a rehearing which was denied by said Court in its opinion of June 28, 1940 (R. 153); this petition for review on writ of certiorari is presented September ....., 1940.

**Statement.**

A summary of the facts is stated in the petition at pages 1 to 8.

POINT I.

**The Decision of the Circuit Court of Appeals That the Judgment Rendered Against a Receiver After His Discharge Is Not Void, Is in Conflict With Its Own Prior Decision and With Decisions of Other Circuit Courts of Appeals.**

*Shepherd* v. *St. Louis Public Service Co.*, 64 Fed. (2) 612, 8th C.

*Peters* v. *Plains Petroleum Co.*, 43 Fed. (2) 49, 10th C.

*Western New York & P. R. Co.* v. *Penn Refining Co.*, 137 Fed. 343, 368, 3rd C.

*Gray* v. *Grand Trunk W. Ry. Co.*, 156 Fed. 736, 743, 7th C.

Plaintiff's action for damages was brought in the State Court against the Receiver of the Chicago, South Bend & Northern Indiana Railway Company only; while it was pending and on November 9, 1929 the District Court entered a foreclosure decree ordering the sale of all the property; this decree contained an express provision recognizing the purchaser's right to be made a party to any suit pending or brought after the sale to contest any claim or

demand. The obligation to make the purchaser a party arose at the date of the sale of all the property on February 11, 1930; it was a matter of public record for almost one full year before trial was begun on October 30, 1930; long before that date the receiver had been divested of every item of property, and he had filed his final report asking for his final discharge before said date; the District Court approved said final report and discharged the receiver without reserve on October 30, 1930. Judgment for plaintiff was not entered until December 22, 1930.

It is uniformly held that suits against a receiver are in effect only against the receivership; he is regarded as in the nature of a corporation sole; suits are against the funds or property in his possession, and judgments against him are payable only from the property in his hands, and his discharge entirely puts an end to his liability; judgments taken after his discharge are absolutely void, unless a statute provides otherwise. There is no such statute in Indiana.

The opinion of the Circuit Court of Appeals emphasizes the fact the Receiver did not give plaintiff any notice of his discharge. The plaintiff knew of the receivership when he brought his action against the receiver on July 1, 1928; he could obtain recognition of his claim only in the Court of the receivership; he knew that said proceeding was running to termination; he was required to proceed according to the provisions of the decree entered November 9, 1929. It should be here noted that there is not in the pleadings any averment nor in the evidence or findings any fact to the effect that plaintiff did not know and have full knowledge of the decree of November 9, 1929 or of the judgment discharging the receiver of October 30, 1930.

But whether the plaintiff or the state court knew of the discharge makes not the slightest difference. This Court

said in *Reynolds* v. *Stockton*, 140 U. S. 254, in which case a receiver was discharged before judgment was rendered against him,

> "If it be said that the attention of the court in which the judgment in question was entered had not been called to this loss of representative power on the part of Parker (the receiver), a sufficient reply is, that if the power was gone, it is immaterial whether the court knew of it or not."

The Court refers to the facts that subsequent to the entry of plaintiff's judgment in the State Court on December 22, 1930, the Receiver of the Chicago, South Bend & Northern Indiana Railway Company took an appeal to the courts of appeal of the State, and that the Receiver was also an officer of the purchaser.

The Court does not undertake to say upon what principle of law a judgment void when entered, becomes valid as against the purchaser of the property in the foreclosure sale, and as against Girard Trust Company, trustee, neither of which were parties to the original action or to the appeal, because of the acts and conduct of the receiver.

The decision of the Circuit Court of Appeals failed to point out any fact or applicable legal principle which made the decision in this cause an exception to the general rule; therefore the general rule established by the decisions of other Circuit Courts of Appeals and by a former decision of the Seventh Circuit, that a judgment taken against a receiver after his discharge is void should have been followed. The decision has so far departed from the accepted course of judicial proceedings as to call for an exercise of this court's power of supervision.

## Point II.

**The Decision of the Circuit Court of Appeals Is Contrary to Decisions of This Court.**

*McMulta* v. *Lochridge*, 141 U. S. 327, 332.

In the above cited case it was stated:

> "So long as the property of the corporation remains in the custody of the court and is administered through the agency of a receiver, such receivership is continuous and uninterrupted until the court relinquishes its hold upon the property, though its personnel may be subject to repeated changes. Actions against the receiver are in law actions against the receivership, and his contracts, misfeasances, negligences and liabilities are official and not personal, and judgments against him as receiver are payable only from the funds in his hands."

In this case by the judgment discharging the receiver the District Court completely relinquished its control over the property; before this suit was brought complete control and possession of all the property had been in the purchaser and its receiver appointed by the St. Joseph Circuit Court for more than six years. The Circuit Court of Appeals expressly holds that the District Court by its orders did not retain jurisdiction of the property, but on the contrary relinquished its hold upon the same. Notwithstanding this it held that a judgment rendered against the District Court's receiver after his complete discharge and after it had surrendered possession of all property, was valid.

The decision of the Circuit Court of Appeals offends against, and is not in harmony with the principles of said decision of this court. It has so far departed from the accepted and usual course of judicial proceedings, as to call for an exercise of this court's power of supervision.

## Point III.

**The Decision of the Circuit Court of Appeals That the Judgment Rendered Against a Receiver of a Street Railway Corporation for Negligence Arising in the Operation of the Property, After His Discharge and After All the Trust Property Has Been Distributed by Him, Is Not Void, Is a Decision of an Important Question of Local Law, and Is in Conflict With Local Law.**

Whether the judgment rendered in the state court was void or not depends upon the state law of Indiana.

*Shepherd* v. *St. Louis Public Service Company*, 64 Fed. (2) 612, 615.

The decisions of the Supreme Court of Indiana declaring the law of this State are:

*Henry* v. *Claffey*, 189 Ind. 609.

*Johnson* v. *Central Trust Co.*, 159 Ind. 605.

The law of Indiana was declared in *Henry* v. *Claffey* as follows:

> "It is well settled that an action for damages for personal injuries resulting from the negligent operation of property in the hands of a receiver cannot be maintained against a receiver in his individual capacity, unless the injury was the result of the personal negligence of the receiver. If the injury results from the alleged negligence of his employees engaged in operating the property under the control of the receiver, he is liable, if at all, in his official capacity, and no judgment can be rendered against him personally. The purpose of such a proceeding against a receiver in his official capacity is to reach the property or fund in his possession as receiver and to subject that to the payment of the demand.
>
> When all of the trust property has been sold, and all the trust funds in the hands of the receiver have been distributed under the order of the court, nothing remains in the hands of the receiver or under his control

> out of which any demand against him in his official capacity can be enforced; and after the receiver has fully administered his trust under the order of the court and has filed his final report and has been discharged, he no longer occupies the official character of receiver, and no valid judgment can be rendered against him in such capacity."

The order or judgment of discharge was unconditional and without any reservation as to existing claims. The Supreme Court of Indiana in *Johnson* v. *Central Trust Company* said:

> "The effect, therefore, of a discharge of a receiver, and the surrender of jurisdiction over the trust, without any reservation as to existing claims, is to release not only the receiver, but also the property from further liability."

Notwithstanding these decisions of the local court the Circuit Court of Appeals not only held the judgment against the discharged receiver to be valid, but a lien upon the property and interests therein of petitioners who were not in any way parties to the proceedings. It disregarded the rule of Indiana Common Law, which was controlling and which should have determined the liability. *Erie Railroad Co.* v. *Tompkins,* 304 U. S. 64.

## Point IV.

**The Decision of the Circuit Court of Appeals Which Holds That a Judgment Secured After the Discharge of the Receiver and Without Substitution of the Purchaser Is Valid Against the Purchaser, Is in Conflict With an Applicable Local Decision of the Supreme Court of Indiana.**

*Henry, Rec.* v. *Claffey,* 189 Ind. 609.

In said cause the court in its order of sale had retained jurisdiction to enforce against the property sold certain

claims arising out of the receivership. But the final judgment discharging the receiver and terminating the control of the court over the property was unconditional. The order of sale gave the purchaser the right to appear in any pending action and contest a claim. It was not made a party, and no notice was given it. The facts were identical in said respects with the facts of the present case.

Said court held that (p. 622):

> "A claimant's proceedings thereunder are analagous to an action *in rem* and it is well settled, that in order to give a court full and complete jurisdiction *in rem*, some form of notice must be given to parties whose rights and interests may be affected by the decree; and where no form of notice is prescribed by law, the court is empowered to direct the notice to be given. Therefore the purchaser and those in possession of the railroad after the sale—whose interests would be affected by the decree establishing a claim against the property—must have notice of such claim and the presentation of it to the court; and thereafter it is competent for the court, if the claimant is by law entitled to a lien, to establish the same against the property, and to fix a time for the payment of the sum found to be due; and in default of payment at the specified time to prescribe a proper order of sale."

"Notice" as the term is here used means legal process. But the decision of the Circuit Court of Appeals substitutes mere knowledge of the pending suit by the purchaser or its agents for notice. It is not an equivalent, and does not meet the requirements of due process of law. As is well said in *National Metal Co.* v. *Greene Cons. Copper Co.*, 11 Ariz. 108, 89 Pac. 535,

> "A distinction is to be observed between knowledge of the pendency of a suit and notice thereof. Jurisdiction can be acquired, if one does not submit himself to it, in no other way than by actual service or by constructive service."

Both by the terms of the decree and under well established principles of equity the purchaser must be substi-

tuted as a party where the receiver has been discharged; this is indespensable before any lien can be cast against the property in the purchaser's possession.

The purchaser was not made a party and there was no legal process or notice to it.

Not only is said decision in conflict with the local law of Indiana but it amounts to the taking of the property of the petitioners without due process of law.

## Point V.

**When the St. Joseph Circuit Court Took Possession of All the Property of Northern Indiana Railway, Inc. Through Its Receiver Appointed December 28, 1931, It Thereby Withdrew All Said Property from the Jurisdiction of Other Courts.**

It is impossible to determine whether the effect of the decision of the Circuit Court of Appeals is that the lien claimed by the plaintiff was established by the foreclosure decree of the District Court in the receivership of the Chicago, South Bend & Northern Indiana Railway Co., or by "the judgment of this court" (meaning the Circuit Court of Appeals) see opinion of June 28, 1940 (R. 154).

Of course the Circuit Court of Appeals could not create one by any original order, and whether plaintiff had a lien was a controversy exclusively cognizable in the St. Joseph Circuit Court.

Neither the District Court nor the Circuit Court of Appeals had the power to retake jurisdiction of the property, declare that plaintiff had a lien thereon, and that the same was prior to the liens of others. The St. Joseph Circuit Court had by appropriate proceedings taken the

property into its possession, and thereby it withdrew the same from the jurisdiction of all other courts.

*Lion Bonding Co.* v. *Karatz,* 262 U. S. 77.
*Shields* v. *Coleman,* 157 U. S. 168.
*Ex parte Baldwin,* 291 U. S. 610.
*Field* v. *Kansas City Ry. Co.,* 9 Fed. (2) 213, 215.
*Reconstruction Finance Corp.* v. *Zimmerman,* 76 Fed. (2) 313, 316.

The State court had had complete possession and control over the property from December 28, 1931, more than four years before the commencement of this suit in the District Court on February 14, 1936. The possession was actual and continuous. The possession of the res by the State court disabled other courts of co-ordinate jurisdiction from exercising any power over it; the State court first acquired jurisdiction through possession of the property, and it became vested with exclusive jurisdiction to determine all contoversies relating to said property; it was and is the exclusive business of the St. Joseph Circuit Court to determine whether upon the records as made in plaintiff's negligence case and in the foreclosure decree plaintiff had a lien upon the property acquired by Northern Indiana Railway, Inc.; it was the exclusive right of said State court to determine whether any such lien had priority over and above the mortgage of Girard Trust Company, Trustee, and to determine its priority, if any, as against wages and material claims.

The decision of the Circuit Court of Appeals expressly states that:

> "We have diligently searched the decree for reservations of jurisdiction to grant the relief sought * * * We do not believe the reservation of jurisdiction for the purpose of enforcing the provision of this decree, included or was intended to include matters of execu-

> tion upon the property upon which plaintiff's judgment was made a lien or to pass upon questions not raised at the time of its entry—of priority of judgment liens over the mortgages."

If the District court did not retain jurisdiction, as the Circuit Court of Appeals holds, then in this suit, the property having been withdrawn from the District Court's jurisdiction by the unconditional discharge of its receiver, and by the subsequent receivership of the same property in the St. Joseph Circuit Court, there was a complete lack of power both in the District Court and in the Circuit Court of Appeals to entertain jurisdiction for any purpose.

The attempted distinction that although the receivership in the St. Joseph Circuit Court withdrew from other courts the power to enforce a lien, it did not withdraw from other courts the power to *determine and establish* a lien, has no support in the decisions of this court or of any other Federal Court. Such a distinction would completely destroy the equity powers of the receivership court to administer the trust.

The decision of the Circuit Court of Appeals contains this provision (R. [illegible]).

> "That plaintiff may proceed to endorse his judgment in the United States District Court if consent be granted by the Indiana State Circuit Court, and in case such consent is not given, said plaintiff may proceed and is authorized to proceed in said state court *as fully as he could in this Court to enforce his said judgment lien against the property,"* etc. (Italics ours.)

If the St. Joseph Circuit Court gives its consent to the enforcement of the lien in the District Court, the latter court must necessarily determine what property shall be sold, the priority of that lien over mortgages, material and labor claims, and all other demands and liens; the holders of such mortgages, material and labor claims, and

other demands would have no opportunity to contest plaintiff's alleged lien, its priority and order of payment; they would not have the right of appeal; they would have all of said rights in the State Court, but would have none of them in the District Court.

If the St. Joseph Circuit Court does not give consent to enforcement in the District Court, then it is mandated that plaintiff may enforce his lien in said state court "as fully as he could in this court." All right of judicial determination is taken away from the St. Joseph Circuit Court, no consideration whatever is to be given the orders and decrees of said Court barring claims and liens, establishing priorities and vesting title to the property in a purchaser at a sale ordered by it; material and labor claimants, other lien holders, purchasers of property and the purchaser's mortgagee, are to have no hearing whatever.

The decision carries upon its face the seeds of destructive judicial conflict; the enforcement of such a judgment would be in defiance of established legal rights, and would be the taking of property without due process as guaranteed by our Federal Constitution.

Plaintiff himself recognized that jurisdiction of his claim was in the St. Joseph Circuit Court; he invoked the jurisdiction of the St. Joseph Circuit Court for the allowance of his alleged claim by filing in the receivership proceedings in said court on September 12, 1933 his petition, which contained averments of practically all the facts contained in the complaint in this case, and asked said Circuit Court to "protect and preserve the lien of this petitioner as a first, paramount and senior lien" (R. 116-118). This petition was never disposed of, but while it was pending plaintiff filed this suit February 14, 1936. This proceeding, if timely brought, was the proper way to assert his claim. But as held in *Lion Bonding Co.* v. *Karatz,* 262

U. S. 77, he could not by the filing of this suit in the District Court attack collaterally the orders and decrees of the State Court made in the administration of the trust.

This court has definitely settled the question that where one court of competent jurisdiction has taken property into its possession, the property is thereby withdrawn from the jurisdiction of all other courts; an important question arises in the opinion and decision of the Circuit Court of Appeals whether its limitation upon said rule, to-wit: that while other courts do not have jurisdiction to enforce liens against the property, they do have jurisdiction to determine and establish liens thereagainst, is valid; the question is raised in this record, and should be settled by this court.

## Point VI.

**The Decision of the Circuit Court of Appeals Holding That Plaintiff Has a Lien on the Property Is in Conflict With the Decision of This Court.**

*Riehle* v. *Margolies,* 279 U. S. 218.

The judgment rendered in the State Court against the Federal Receiver did not give plaintiff a lien upon property; it was a judgment *in personam* and merely established the existence and amount of his claim.

The foreclosure decree of the District Court did not give to plaintiff's judgment any lien. It provided that

> "all liability for negligence claims not now reduced to judgment shall be valid as against the property of said railway company at the sale herein ordered *made to the same extent as though any judgment thereon had been recovered prior to the sale.*" (Italics ours.)

Obviously if it had been rendered "prior" to the sale it would not have created a lien. Therefore by the express provisions of the decree it did not create any.

This provision of the decree has to be construed with another provision of the decree (R. 104), which provides for the barring of claims with certain exceptions. One exception is:

> "Any claims which may accrue after the entry of this decree and/or which may thereafter be proved *nunc pro tunc* by the permission of this court."

This provision plainly means that the judgment of the State Court had to be brought to the Federal Court by way of intervention in the receivership proceeding for allowance *nunc pro tunc,* that is for proof and allowance as if it had been rendered prior to the sale. Plaintiff never has so intervened as required by said decree.

That the decision of the Circuit Court of Appeals is in conflict with decisions of this Court, and has so far departed from the accepted and usual course of judicial proceedings as to call for this court's power of supervision.

## Point VII.

**If There Was Any Lien Cast Upon the Property of the Railway It Was Because of the Provisions of the Foreclosure Suit in the District Court and the Negligence Action in the State Court; the Petitioner Girard Trust Company, Trustee, Was Not a Party to Either of These Causes; the Decision of the Circuit Court of Appeals That Its Judgment Is a "Valid Adjudication" as to Said Girard Trust Company, Trustee, Is a Taking of Its Property Without Due Process of Law.**

Due process was defined by this Court in *Ochoa* v. *Hernandez Y Morales,* 230 U. S. 139 as follows:

> "Without the guaranty of 'due process' the right of private property cannot be said to exist, in the sense in which it is known to our laws. The principle, known to the common law before Magna Charta, was

> embodied in that Charter (2 Coke, Inst. 45, 50), and has been recognized since the Revolution as among the safest foundations of our institutions. Whatever else may be uncertain about the definition of the term 'due process of law,' all authorities agree that it inhibits the taking of one man's property and giving it to another, contrary to settled usages and modes of procedure, and without notice or an opportunity for a hearing."

The mortgage lien of Girard Trust Company, Trustee, against the property came into being January 1, 1900; it was in no way a party to the foreclosure proceedings in the District Court; the property was sold under the decree subject to said mortgage; the District Court was wholly lacking in jurisdiction to make any decree that would disturb its mortgage lien, to give anyone priority over it, or to affect it in any way.

As it was not a party to the foreclosure proceedings, obviously the District Court could not by its decree affect petitioner's rights therein; and therefore since this proceeding was nothing more than one for the construction of the terms of that decree, it could not here be adjudged that plaintiff has a valid judgment as against this petitioner. The decree of foreclosure expressly gives priority even to second and third mortgages over such claims as plaintiff's (R. 103 (d)); it was only in the receivership proceedings in the District Court that plaintiff could have been given any priority. The decision of the Circuit Court of Appeals not only construes the foreclosure decree contrary to its express terms, but it undertakes to adjudge upon a subject where it had no jurisdiction.

**Conclusion.**

It is thereforre respectfully submitted that the questions which the petition suggests should be definitely settled by this court, and that to such an end a writ of certiorari should be granted, and this Court should review the decision of the Circuit Court of Appeals for the Seventh Circuit and finally reverse it, and order the affirmance of the judgment of the United States District Court.

Respectfully submitted,

RAYMOND R. SMITH, as Receiver of
Northern Indiana Railway, Inc.,
By ORLO R. DEAHL,
*Counsel for said Petitioner.*

SEEBIRT, OARE & DEAHL,
*Of Counsel for Raymond*
*R. Smith, Receiver.*

NORTHERN INDIANA RAILWAY, INC.,
By AL. W. JOHANNES,
*Counsel for said Petitioner.*

GIRARD TRUST COMPANY, as Trustee,
By S. J. CRUMPACKER,
*Counsel for said Petitioner.*

PARKER, CRABILL, CRUMPACKER,
MAY, CARLISLE & BEAMER,
*Of Counsel for Girard*
*Trust Company, Trustee.*

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1940.

## No. 418

RAYMOND R. SMITH, AS RECEIVER OF NORTHERN INDIANA RAILWAY, INC., NORTHERN INDIANA RAILWAY, INC., AND GIRARD TRUST COMPANY, AS TRUSTEE,
*Petitioners,*

*against*

ABBOTT LAWRENCE MILLS,
*Respondent.*

## PETITIONERS' REPLY BRIEF.

ORLO R. DEAHL,
AL. W. JOHANNES,
S. J. CRUMPACKER,
*Counsel for Petitioners.*

SEEBIRT, OARE & DEAHL,
PARKER, CRABILL, CRUMPACKER, MAY,
CARLISLE & BEAMER,
*Of Counsel.*

THE BUNTHORP-WARREN PRINTING COMPANY, 210 WEST JACKSON, CHICAGO

TABLE OF CASES CITED.

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1940.

---

**No. 418.**

---

RAYMOND R. SMITH, AS RECEIVER OF NORTHERN INDIANA RAILWAY, INC., NORTHERN INDIANA RAILWAY, INC., AND GIRARD TRUST COMPANY, AS TRUSTEE,
*Petitioners,*

*against*

ABBOTT LAWRENCE MILLS,
*Respondent.*

---

## PETITIONERS' REPLY BRIEF.

---

The brief submitted by the respondent to the petition for a writ of certiorari confesses and emphasizes the petitioners' contention that important questions of law are presented which should be settled by this Court. The respondent's argument is concerned not with the importance of the questions, but with contending that the proper determination of those questions would result in the affirmance of the judgment.

Respondent attempts to secure a denial of the petition and a sustaining of the judgment in his favor by attempting to inject into the case matters entirely dehors the record. On page 21 of his Brief, and by an appendix he attempts to inject into the record an affidavit made September 26, 1940 (nine days after the petition was filed in this Court), made by the Clerk of the St. Joseph Circuit Court that the Plan of Reorganization submitted by the

Bondholders' Protective Committee in the reorganization of Northern Indiana Railway, Inc. stated that if an appeal is taken to the Circuit Court of Appeals "and further if the plaintiff's alleged lien is sustained, it will be paid in cash under the provisions of Article III", and from this he argues on page 2 of his Brief that the "Priority Question is Moot".

It is perhaps true that a motion should be filed to strike this extraneous matter, but we refrain from so doing with the confidence gathered from the opinion of this Court in *Schley* v. *Pullman Palace Car Co.*, 120 U. S. 575, in which this Court said in reference to similar conduct by a party:

> "Much less does it palliate his attempt to influence the decision here, by reference to matters not in the record, and which he must have known could not be taken into consideration. It is only necessary to say that the facts dehors the record, which have been improperly introduced into the brief of the counsel for the defendant in error, have not in any degree influenced our determination of the case."

But if said matter were a part of the record, it would be unimportant and without influence for the obvious reasons (a) that it does not appear who filed the Plan of Reorganization or that petitioners are bound thereby; and (b) an agreement to discharge a lien "if the plaintiff's alleged lien is sustained" does not mean a void or erroneous determination to that effect; it does not preclude a review of an erroneous judgment.

No question presented by the petition has become moot; and it is of the utmost importance that the questions presented shall be reviewed by this Court; that importance is emphasized by the two judgments in this cause by the Circuit Court of Appeals, the first affirming, and the second reversing the judgment of the District Court; both of which judgments were entered upon identically the same opinion.

## Point I.

Respondent incorrectly states that petitioners take two positions (1) that the situation is controlled by the federal laws, and (2) that it is one of local law. Instead petitioners present, as they have the right to do under Rule 38, Clause 4(b) of the rules of this Court, first, that the Circuit Court of Appeals has rendered a decision in conflict with the decision of another Circuit Court of Appeals on the same matter, and second, that it has decided an important question of local law in a way probably in conflict with applicable local decisions.

Respondent says (page 3) "we will not discuss the question whether the Circuit Court of Appeals followed the local or federal decisions as in either event the Circuit Court of Appeals was right". He wholly misconceives the purpose and function of certiorari; jurisdiction was not conferred upon this court merely to give the defeated party in the Circuit Court of Appeals another hearing, but instead it was given, first, to secure uniformity of decision in the circuit courts, and second, to bring up cases involving questions of importance which it is in the public interest to have decided by this Court.

*Magnum Import Co.* v. *Coty*, 262 U. S. 159.

## Point I.

Point I in the Petition states a conflict of decisions between different Circuit Courts of Appeals. Therefore the many cases decided by state tribunals cited by respondent have no relationship whatever to the Point.

In *Shepherd* v. *St. Louis Public Service Co.*, 64 Fed. (2) 612, the Eighth Circuit decided that "the judgment in the state court is a nullity because rendered only against the receiver and after he had been fully discharged". The Court expressly held that the Missouri statute against abatement was of no avail to the plaintiff; that it did not save plaintiff's judgment from the application of the com-

mon law rule that judgments rendered against a receiver after his complete discharge are void.

Respondent says (page 3) that there would be a conflict if the Missouri statute were similar to the Indiana statute. Excepting that the Missouri statute has an indemnification clause which the Indiana statute does not have, the two are most similar in their terms as to transfer of interest and are identical in their meaning: We quote them:

| MISSOURI (Sec. 904 Mo. St.) | INDIANA (2-227 Ind. St.) |
|---|---|
| "When an interest is transferred in any action now pending, or hereafter to be brought, other than that occasioned by death, marriage or other disability of a party, the action shall be continued in the name of the original party if the party to whom the transfer is made will indemnify the party in whose name the suit is to be continued against all costs and damages that may be occasioned thereby, or the court may allow the person to whom the transfer is made to be substituted in the action; and in all such cases the party to whom the transfer is made shall be required by the court, upon application of the party who made the transfer, either to give such indemnity or to cause himself to be substituted in the action, and upon his omission to do so the court shall order the suit to be dismissed." | "No action shall abate by the death or disability of a party, or by the transfer of any interest therein, if the cause of action survive or continue. In case of the death or disability of a party, the court on motion or supplemental complaint, at any time within one (1) year, or on supplemental complaint afterward, may allow the action to be continued by or against his representative or successor in interest. In case of any other transfer of interest, the action shall be continued in the name of the original party; or the court may allow the person to whom the transfer is made to be substituted in the action." |

At common law the rule was that a transfer of plaintiff's interest *pendente lite* abated the action; and statutes, such as the two above quoted were enacted to abrogate that rule so that substitution of the transferee as plaintiff is permitted, or the action shall be continued in the name of the original plaintiff. There are no cases in Indiana hold-

ing that this statute permits the continuance of the action against a defendant, from whom pending the action, there is a transfer or devolution of liability which is the subject of the action.

In construing this statute the respondent refers to the New York case of *Baer* v. *McCullough,* 176 N. Y. 97, 68 N. E. 129. That case can have no persuasive influence in construing an Indiana statute, and obviously the statute is very different than the Indiana statute, in that the New York statute not only covers a transfer of interest, but a "devolution of liability" pending the action; by its express terms it included a devolution of liability from a defendant to another.

Respondent's only attempt to distinguish the other Federal cases is upon the point that they show that the action was brought after the receiver was discharged. This is a fact which does not create the distinction contended for. As stated by this Court in *McNulta* v. *Lochridge,* 141 U. S. 327, "actions against a receiver are in law actions against the receivership or funds in the hands of the receiver". If there is no receivership or funds there can be no valid judgment irrespective of when the action is brought.

And neither has respondent made a valid distinction as to the case of *Reynolds* v. *Stockton,* 140 U. S. 254; the statement of this Court in that case disposes of the contention of respondent that where the discharged receiver fails to plead specially his discharge, the judgment is not void, but is valid. It was there said if the representative power is gone, it is immaterial whether the court which rendered the judgment knows of it or not. This plain statement of the law was not made dependent upon, nor was it influenced by, the fact that the action was ancillary, nor by any question of authority of counsel, as respondent argues.

Respondent states that petitioners have cited no case from the Seventh Circuit adverse to the opinion in the

present case (p. 5). In *Gray* v. *Grand Trunk Western Ry. Co.*, 156 Fed. 736, 743, that court in its opinion said:

> "With the termination of the receivership and transfer of property and funds, as disclosed in the declaration, the suit at law was not maintainable against the receivers."

In the present case there was a complete transfer of all property and funds by an open and public record on February 11, 1930 (R. 110), almost eleven months before respondent took his judgment; and the receiver was discharged by an open and public record almost two months before the judgment was rendered. The judgment was void no matter when the action was brought.

The decree expressly gave the purchaser at the receiver's sale the right to be made a party (R. p. 104(i)). This was a provision which went to the very consideration of the purchase, and respondent's contention (p. 5) that the purchaser became bound to pay a negligence claim without being made a party is contrary to the plain terms of the order of sale.

## Point II.

Respondent says that the decision of the Circuit Court of Appeals is not in conflict with the rules of law stated by this Court in *McNulta* v. *Lochridge*, 141 U. S. 327.

The rule in that case states that so long as the property of a corporation remains in the custody of a court and is being administered by it through a receiver, such receivership is continuous until the court relinquishes its hold upon the property, that actions against the receiver are actions against the receivership, and judgment against him in his official capacity can be paid only from funds in his hands.

Respondent does not attempt to show how his judgment can be valid under the facts that his judgment was ob-

tained ten months after the District Court had "relinquished its hold upon the property" by an unconditional discharge of the receiver, and the purchaser was not made a party.

He says that the decree of the District Court reserved jurisdiction of the matter, and cites *Julian* v. *Central Trust Co.*, 193 U. S. 93 and other cases, which had very definite clauses in the decrees reserving jurisdiction. But the Circuit Court of Appeals in this case expressly decided that there was no reservation of jurisdiction in the decree (R. 151).

## Point III.

Respondent at the top of page 18 of his Brief admits that the decision of the Circuit Court of Appeals "is a decision of an important question of local law". But he contends that the same is not in conflict with local law.

The respondent has not shown that the decision is not in conflict with *Henry, Rec.* v. *Claffey*, 189 Ind. 609. The only distinction he attempts to make is that in *Henry, Rec.* v. *Claffey* an answer set up the discharge, while there was no such answer in the present case. As was said by this court in *Reynolds* v. *Stockton*, 140 U. S. 254, that is no distinction at all; if the representative power is gone, it is immaterial whether the Court was informed of the fact by answer or otherwise. Where a judgment is taken against a receiver after the appointing Court has given up the custody of the property and the receiver has been unconditionally discharged, the situation is not unlike that where a judgment is taken against a defendant who dies pending the action; the judgment is void.

This is the only distinction attempted by the respondent, and the decision of the Circuit Court of Appeals makes none whatever; it does not even refer to this controlling decision of the Supreme Court of Indiana; the common law

of Indiana, determining the law with respect to the validity of judgments against discharged receivers has been declared by the Supreme Court of that State in *Henry, Rec.* v. *Claffey,* 189 Ind. 609, and the principles of law therein declared have not been impaired by any subsequent decision of that court. As was said by this Court in *Erie Railroad Co.* v. *Tompkins,* 304 U. S. 64, federal courts do not have the power to use their judgment as to what the rules of the common law are.

> "Law in the sense in which courts speak of it today does not exist without some definite authority behind it. The common law so far as it is enforced in the State, whether called common law or not, is not the common law generally, but the law of that State existing by the authority of that State without regard to what it may have been in England or anywhere else, * * * the authority and only the authority is the State, and if that be so, the voice adopted by the State as its own (whether it be of its Legislature or of its Supreme Court) should utter the last word."

The decision and opinion of the Circuit Court of Appeals ignores the local law as declared in *Henry, Rec.* v. *Claffey,* and rendered a decision not only in conflict with it, but with the general common law of the land.

The respondent wholly avoids the question in his point that the Courts of Appeal of Indiana had reviewed the alleged errors in the negligence case. That a judgment against a receiver after his unconditional discharge, and after all funds in his hands have been distributed, under the order of the Court, is void, was not before the Court in the appeal of said negligence case.

If the judgment rendered by the State Court was void when rendered, as it was, it did not become valid by the acts of the receiver appealing the same. The judgment was not voidable, it was void, and can be collaterally attacked.

The Circuit Court of Appeals, without holding that

there is any principle of estoppel applicable, seems to hold that this void judgment became valid because no answer setting up the discharge was filed and because the purchaser paid part of the costs of appealing the negligence case. The opinion says that in this action wherein the receiver was the only defendant that it was his duty to appear and defend "and in so doing he was the proper spokesman for, and protector of, the defendant." Who is meant by the "defendant" is not clear, but presumably it means "the purchaser". Then the court criticises the receiver for appealing the cause, and in not informing the respondent of facts disclosed by public judicial records. The receiver was not obliged to inform respondent of the contents of public records to which he had free access, and upon which he must rely for the acquirement of any rights against the receivership. There is no contention that there was the concealment of any fact not contained in a public record.

When the negligence trial was begun October 30, 1930, all the property had been turned over to the purchaser under order of the Court since February 11, 1930 (R. 110). This order by its terms required the making of the purchaser a party if the plaintiff desired to reach property in its hands (R. 104). It did not, as the Circuit Court of Appeals states, make the receiver the "spokesman and protector" of the purchaser.

When the judgment was entered December 22, 1930, the receiver had been discharged by a judicial and public order 53 days, and the receiver had been divested of all property by an order of the Court for more than ten months.

In the appeal there was no stay or supersedeas bond filed (R. 125); respondent was entirely free to enforce his alleged judgment, or to bring any new proceeding based upon the orders of the District Court. He was at

all times possessed of the remedy to request the setting aside of the order of discharge, and the allowance of his claim by the receivership court as the order permitted (R. 104). Respondent did none of these things.

While the foreclosure decree stated that negligence claims not then reduced to judgment should be valid "to the same extent as though any judgment thereon had been recovered prior to the sale", it also required such judgments to be proved in the receivership court (R. 104(h)).

Respondent was not misled in any way by petitioners or any of them and no claim could possibly be made that petitioner Girard Trust Company acted in any way in the matter. Respondent's position is entirely due to his indifference to the rights given him and the obligations imposed upon him both by these public records and by the plain principles of law contained in the case of *Henry, Rec.* v. *Claffey.*

## Point IV.

The Supreme Court of Indiana in the case of *Henry, Rec.* v. *Claffey,* 189 Ind. 609, clearly stated the local law of Indiana that in such a case as the present, in order to reach the property sold at a receiver's sale, and impress a charge upon it, "the purchaser and those in the possession of the railroad after the sale—whose interests would be affected by the decree establishing a claim against the property—must have notice of such claim and the presentation of it to the Court."

In an entirely parallel case the Eighth Circuit Court of Appeals in *Shepherd* v. *St. Louis Pub. Ser. Co.,* 64 Fed. (2d) 612 said:

> "From the above, it is clear that no provision in the contract of purchase can be construed as authorizing or permitting the establishment of claims, the payment of which was assumed by the purchaser, to be anywhere except in the court conducting the re-

> ceivership. The appellant is not asking that court to establish the validity and amount of his claim, but is asking the court to accept the judgment of the state court as an establishment of the claim and to enforce it. In so doing, he has not brought himself within the terms upon which the purchaser assumed responsibility. Therefore, even if the judgment in the state court were entirely valid, it could be the basis of no enforceable obligation against the purchaser under the reservation of jurisdiction in the federal court."

Respondent's duty to make the purchaser a party arose on the day the sale was approved, to-wit, February 11, 1930; he attempts no explanation of his failure to do what both the terms of the decree and well established principles of equity required. His only answer is that this was in issue in the negligence case.

It was not in issue at any time in the negligence case; respondent obtained his rights, if any, against the property sold at the receiver's sale only through the foreclosure decree, and it was his duty to pursue those rights under that decree; it was not the duty of petitioners to pursue them for him.

We find nothing in respondent's Brief under this point suggesting any modification of the rule in *Henry, Rec.* v. *Claffey,* 189 Ind. 609 by any subsequent decision of the Supreme Court of Indiana. In the case of *State, ex. rel. Elder* v. *Circuit Court,* 212 Ind. 1, there was a plain reservation of jurisdiction and there was no unconditional discharge of the receiver.

## Point V.

The receivership of the Chicago, South Bend & Northern Indiana Railway Company was terminated in the District Court by an unconditional discharge on October 30, 1930 (R. 111). The purchaser at the receiver's sale had the actual and legal possession of all said property from that date to December 28, 1931 when in an equity receivership the St. Joseph Circuit Court, a State Court, took the actual and legal possession of the same (R. 112). The District Court has never since said discharge asserted any power or jurisdiction over said property and was never asked to until respondent filed this proceedings February 14, 1936 (R. 127); and the District Court refused to take jurisdiction of this case wholly for the reason that it had lost jurisdiction, and to retake it would be an unjustified interference with the State Court which had carried on administration of the trust since December 28, 1931 (R. 124).

The unconditional discharge of the receiver on October 30, 1930 was the final judgment in the receivership cause; no matter what reservations there may have been in any interlocutory or intermediate orders, it was the unconditional discharge of the receiver which terminated both the actual and constructive custody and possession of the property by the District Court, and ended the official existence of the receiver. Since jurisdiction over the property after the discharge was not reserved by the District Court, the State Court had exclusive control thereof. The Resolute, 168 U. S. 437.

The respondent at pages 15-16 of his Brief argues that jurisdiction was reserved in the very face of the opinion of the Circuit Court of Appeals that it was not (R. 151).

We have restated the facts only to urge again the apparent and unseemly conflict of jurisdictions created by the

decision; it is inherent and obvious in these words of the judgment:

> "that plaintiff may proceed to enforce his judgment in the United States District Court if consent be granted, by the Indiana State Circuit Court, and in case such consent is not given, said plaintiff may proceed and is authorized to proceed in said state court as fully as he could in this court to enforce his said judgment lien against the property of the Northern Indiana Railway, Inc. and for any other rights which he may have by virtue of his judgment as determined and established by this court as well as the lien which was created by said judgment and the judgment of this court by this decree; and for any other relief *consistent with the views expressed in the opinion of this court.*" (Italics ours.)

We have found no case, not even those where the unauthorized assumption of jurisdiction is condemned, wherein the seeds of unseemly strife between courts were so patently present as in this decision. Deference to the possession and powers of the State Court was recognized by the District Court, and it was likewise a judicial duty of the highest order of the Circuit Court of Appeals to recognize it.

It was the exclusive duty and power of the State Court (a) to examine the proceedings had in the former receivership and in the negligence case and determine whether respondent had a valid judgment, (b) whether it imposed a lien, (c) whether it had priority over other claims and the mortgage of petitioner Girard Trust Company, Trustee, (d) whether respondent had filed his claim in time, and (e) if he was entitled to relief, what it should be.

The State Court had a right to make its determination consistent with its views, not "consistent with the views expressed in the opinion of this court," *i. e.*, the Circuit Court of Appeals.

The question here presented is of the highest importance; if this decision of the Seventh Circuit stands as the law

governing similar cases then there will be a complete destruction of those rules which have heretofore preserved the proper courtesy and respect of federal courts towards state courts.

## Point VI.

Respondent has wholly failed to discuss the question presented under this Point, which is "Did plaintiff have a lien?" Instead he assumes that the only thing done by the decision of the Circuit Court of Appeals was the "recognition of a prior determination of the existence and amount of indebtedness of the defendant to creditors seeking to participate," and that since such a judgment would not deal directly with property, it would not offend as against this court's decision in *Reihl* v. *Margolies*, 279 U. S. 218. But the decision here not only defined the amount of the debt, it (a) declared a lien for its protection, (b) gave it priority over mortgages, (c) requires the State Court to give recognition to the debt and lien even though respondent has not met the requirements of that court as to the presentation of claims.

*Reihl* v. *Margolies* says that the State Court having taken into its possession all the property of the railway in an equity receivership had the right "to decide all questions incident to the preservation, collection and distribution of the assets." That right is entirely destroyed by the decision of the Circuit Court of Appeals.

## Point VII.

Respondent admits that petitioner Girard Trust Company, Trustee, was not a party either to the negligence case or to the receivership case, but urges that the question is moot because the Girard Trust Company, Trustee "has agreed to a plan of reorganization," and cites an Appendix at page 21 of his Brief, which he has most improperly attempted to make a part of the record. Even if the affidavit shown in said Appendix were a proper part of the record, we inquire wherein does it appear that Girard Trust Company "agreed" to it, or was in any way a party to it, or that said petitioner had anything to do with the formulation of the Plan.

Respondent next says, even if it was not a party, nevertheless the "Girard Trust Company's lien is inferior to plaintiff's."

The question is whether this petitioner was accorded due process of law under the Fifth Amendment of the Constitution of the United States; it is not whether a prior lien in respondent's favor would have been declared valid if said petitioner had been made a party. If this petitioner had been accorded due process it would have had an opportunity of presenting all the evidence, not part as the respondent attempted to do *ex parte;* the case of *McCullough* v. *Union Traction Company,* 206 Ind. 585, depended upon its own facts, and this court cannot assume that that case would be similar and controlling upon facts elicited in a hearing given the petitioner; the decision in the McCullough case is based on the Public Service Commission law, here the petitioner's mortgage lien came into existence in 1900, thirteen years before the enactment of the Public Service Commission law of Indiana.

We know of no rule of law or morals which holds that

without a hearing one man's property can be taken and given to another, upon the assumption that if he had been given a hearing, he would still have lost it.

It seems unnecessary again to emphasize the offense given by this decision against those great constitutional safeguards which are fundamental in our judicial system.

We again urge the importance of the questions submitted by the petition, and pray that a writ of certiorari be granted.

Respectfully submitted,

RAYMOND R. SMITH, as Receiver of Northern Indiana Railway, Inc.,
By ORLO R. DEAHL,
*Counsel for said Petitioner.*

SEEBIRT, OARE & DEAHL,
*Of Counsel for Raymond R. Smith, Receiver.*

NORTHERN INDIANA RAILWAY, INC.,
By AL. W. JOHANNES,
*Counsel for said Petitioner.*

GIRARD TRUST COMPANY, as Trustee,
By S. J. CRUMPACKER,
*Counsel for said Petitioner.*

PARKER, CRABILL, CRUMPACKER,
MAY, CARLISLE & BEAMER,
*Of Counsel for Girard Trust Company, Trustee.*

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1940.

## No. 418

RAYMOND R. SMITH, AS RECEIVER OF NORTHERN INDIANA RAILWAY, INC., NORTHERN INDIANA RAILWAY, INC., AND GIRARD TRUST COMPANY, AS TRUSTEE,
*Petitioners,*

*vs.*

ABBOTT LAWRENCE MILLS,
*Respondent.*

## OPPOSING BRIEF OF RESPONDENT.

ROBERT A. GRANT,
*Counsel for Respondent.*

LOUIS M. HAMMERSCHMIDT,
MILTON A. JOHNSON,
*Of Counsel.*

THE GUNTHORP-WARREN PRINTING COMPANY, 310 WEST JACKSON, CHICAGO

## INDEX.

TABLE OF CASES CITED.

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1940.

## No. 418

RAYMOND R. SMITH, AS RECEIVER OF NORTHERN INDIANA RAILWAY, INC., NORTHERN INDIANA RAILWAY, INC., AND GIRARD TRUST COMPANY, AS TRUSTEE,
*Petitioners,*

*vs.*

ABBOTT LAWRENCE MILLS,
*Respondent.*

## OPPOSING BRIEF OF RESPONDENT.

### STATEMENT OF THE CASE.

The statement of the petitioners omitted the following facts which are undisputed:

1. An allowance of fees was made to counsel in the United States District Court for the trial of the negligence case in the State Court prior to the discharge of the receiver on October 30, 1930, the date the trial in the State Court began. In the subsequent appeal to the Appellate and the petition to transfer to the Supreme Courts of Indiana, the Northern Indiana Railway Company, (the purchaser) or its receiver appointed by the St. Joseph Circuit Court, provided the funds for the expense of said appeal and transfer. (R. 125.)

2. The claims attorney of the Northern Indiana Railway, Inc., rendered services at the negligence trial which were paid by said corporation, the purchaser (R. 126) and the same attorneys continued in that litigation. (R. 126.)

3. The plaintiff, Mills, had no actual knowledge of the entry of the order discharging the receiver of the Chicago, South Bend & Northern Indiana Railway Company in the District Court. (R. 126.)

4. During the receivership in the District Court the Girard Trust Company was paid interest on its mortgage in the sum of $125,000. (R. 95.)

5. During the receivership in the District Court over $415,000 was expended for betterments on the line of the railroad. (R. 122-123.)

6. The sum of $153,359.01 in cash was turned over by the receiver of the Chicago, South Bend & Northern Indiana Railway Company to the purchaser, Northern Indiana Railway, Inc. (R. 110-111.)

**New Matter Disclosing Priority Question Is Moot.**

Subsequent to the filing of this case and prior to the disposition in the Circuit Court of Appeals in the proceedings brought in the St. Joseph Circuit Court, the parties to said proceedings agreed in a plan of reorganization approved by the court that the holders of preferred claims against the old company, if any, as determined by the court, shall be paid the amount thereof, in cash, upon consummation of the plan. In the footnote of Article III of the plan of reorganization, the judgment involved in this proceeding is specifically referred to and this language used:

> "If an appeal is taken and further if the plaintiff's alleged lien is sustained, it will be paid in cash under the provisions of Article III."

(See certified copy of Article III and footnote, appended hereto.)

## Point I.

**The Decision of the Circuit Court of Appeals That the Judgment Rendered Against a Receiver After His Discharge Is Not Void, Is Not in Conflict With Its Own Prior Decision and With Decisions of Other Circuit Courts of Appeals.**

Petitioners are attempting in their brief to take two positions: (1) that the situation is controlled by the federal laws under this point; and (2) that the question is one of local law, under point III. As far as respondent is concerned, we shall not discuss the question of whether the Circuit Court of Appeals followed the local or federal decisions as in either event the Circuit Court of Appeals was correct in its decision.

Petitioners under this point cite four cases. Not one of these cases is in point. The case of *Shepherd* v. *St. Louis Public Service Co.*, 64 Fed. (2d) 612, might have been some authority for appellees' position if the Missouri statutes concerning transfer of interest were similar to the Indiana statutes, but they are dissimilar. The Missouri statute provided that where an interest is transferred, the action shall be continued in the name of the original party, if the party to whom the transfer is made will indemnify the nominal party against costs and damages or the court may allow substitution and in all such cases the party to whom the transfer is made shall be required, upon application of the party who made the transfer, either to give indemnity or cause himself to be substituted, and upon his omission, the suit to be dismissed. The Indiana statute affirmatively and mandatorily provides that no action shall abate by the transfer of any interest therein, and that the action shall be continued in the name of the original party or the court may allow the person to whom the transfer is made to be substituted in the action. (Burns Ind. St. Ann. 1933, 2-227.)

The result reached in the *Shepherd* case was based upon the state law, and the court specifically, at page 615 of that case, states that whether or not the appellant's judgment is valid, is determined by the state law. The mandatory provision of the Indiana statute is seen in the case of *Baer* v. *McCullough,* 176 N. Y. 97, 68 N. E. 129. We cannot refrain from strenuously urging that in this case a statute which provided that the action *may* be continued was held of sufficient force that a judgment such as in the case at bar was valid. The Indiana statute provides that no action *shall* abate. It is irrefutable that the *Shepherd* v. *St. Louis Public Service Co.,* 64 Fed. (2d) 612, and *Baer* v. *McCullough,* 176 N. Y. 97, 68 N. E. 129, are not contra. They are distinguished by reason of difference in the statutes, as pointed out by the court in its opinion in the *Shepherd* case.

The case of *Peters* v. *Plains Petroleum Co.,* 43 Fed. (2d) 49, likewise is not in point. In that case the question of the discharge of the receiver was raised in the case against the receiver. The cause turned upon a release and the interpretation thereof. In the case at bar the Appellate and Supreme Courts of Indiana have upheld the validity of the judgment against the receiver. *Smith* v. *Mills,* 98 Ind. App. 543, 185 N. E. 327. The first time the question of the right to sue the receiver was raised was in the proceedings in this case. This is a collateral attack on a judgment of the courts of Indiana.

In the case of *Western New York & P. R. Co.* v. *Penn Refining Co.,* 137 Fed. 343, the receiver was discharged four years before the action was begun. The question of the power to sue the receiver was raised in the suit and not in a collateral attack. In the case at bar there is no question that the suit was begun while the receiver was in actual possession, control and operation of the property. Petitioner also cites *Gray* v. *Grand Trunk W. Ry. Co.,* 156 Fed. 736, but in that case as in the *Western New York & P. R. Co.* v. *Penn Refining Co.,* the action was brought after the

discharge of the receiver. In their discussion petitioners state that there is no statement in the evidence or averment in the pleading that the plaintiff did not have knowledge of the discharge of the receiver. The record contradicts petitioners' statement. Plaintiff had no actual knowledge of the discharge. (R. 126.)

Petitioners also rely on *Reynolds* v. *Stockton*, 140 U. S. 254, but in that case there was a clear distinction. There the question of the authority of an ancillary receiver to bind the primary receiver is involved. Then again this Court points out that there was no authoritative appearance on behalf of the primary receiver. In the case at bar there was an authoritative appearance on behalf of the company which assumed liability therefor.

Counsel for petitioners cite no case on their proposition that the Circuit Court of Appeals for the Seventh Circuit has held adversely to its opinion in this case. The fact is in the case of *Railway Steel Spring Co.* v. *Chicago & E. Ill. Ry. Co.*, 12 Fed. (2d) 430, 433, the court had a similar case before it and there stated:

> "It is also apparent that appellant took part in the proceedings in the state courts to the extent of petitioning the Supreme Court for a rehearing at a time when it alone was empowered to act in the name of the receiver who had long theretofore been discharged."

Petitioners overlook the rule that the purchaser need not be made a nominal party defendant because all those whose interests are involved and who conduct and control the defense are bound as real parties and are concluded by the judgment. In *Montgomery, et al.* v. *Vicory*, 110 Ind. 211 (214), 11 N. E. 38 (40) the court stated:

> "One who, though not a party, defends or prosecutes an action by employing counsel, paying costs, and by doing those things which are usually done by a party, is bound by the judgment rendered therein."

This rule has been stated in *Washington Gas Light Co.* v.

*D. C.*, 161 U. S. 316 (332-333), 40 L. Ed. 712 (720), and in *Robbins* v. *Chicago*, 4 Wall (U. S.) 657, 18 L. Ed. 427 (430).

In the case of *Shugart* v. *Mills*, 125 Ind. 445 (454), 25 N. E. 551 (554), it was pointed out that it is unnecessary to show by direct evidence that such a party took part in the former action, but it is enough to prove circumstances as fairly authorize the inference that they did take part; "for, in civil cases," as the court said, "conclusions may be inferred from facts established by a fair preponderance of the evidence."

Property may be followed through successive receivership. The plaintiff's claim has been adjudicated. *Smith, etc.*, v. *Mills*, 98 Ind. App. 543, 185 N. E. 327. A federal court will not relitigate the adjudication of the state court that a receiver in his official capacity was responsible for torts committed during his operations. *St. Louis U. T. Co.* v. *San Benito Land & Water Co.*, 4 F. (2d) 1007 (1010); *Penn General Gas Co.* v. *Penn*, 294 U. S. 189 (195), 79 L. Ed. 850 (855).

Certainly the plaintiff under the facts was entitled to have his judgment protected by a conclusion that plaintiff had a valid judgment binding both on the Northern Indiana Railway, Inc., and its receiver. The decision of the Circuit Court of Appeals for the Seventh Circuit certainly discloses that it is not contrary, but in harmony with the decisions of this Court, the decisions of its own and of the State of Indiana.

## Point II.

### The Decision of the Circuit Court of Appeals Is Not Contrary to Decisions of This Court.

Petitioners are in error when they state that the opinion of the Circuit Court of Appeals contravenes the case of *McNulta* v. *Lockridge*, 141 U. S. 327. The rule set forth on page 17 of petitioner's brief is not disputed, to-wit:

> "So long as the property of the corporation remains in the custody of the court and is administered through the agency of a receiver, such receivership is continuous and uninterrupted until the court relinquishes its hold upon the property, though its personnel may be subject to repeated changes. Actions against the receiver are in law actions against the receivership, and his contracts, misfeasances, negligences and liabilities are official and not personal, and judgments against him as receiver are payable only from the funds in his hands."

But the rule is not violated in the case at bar. No order can be pointed to which requires payment from anything other than the property of the receivership. The order gave plaintiff a lien against the property and it is the only place plaintiff could look for payment. The question of discharge of a receiver as terminating all rights to continue pending litigation which could ripen into a lien against subsequent purchasers certainly is not involved in the *McNulta* case. The ruling cases which establish plaintiff's right are *Julian* v. *Central Trust Co.*, 193 U. S. 93, 48 L. Ed. 629, *Wabash R. R. Co.* v. *Adelbert College*, 208 U. S. 37 (54), 52 L. Ed. 379 (386) and *State ex rel. Elder, et al.* v. *Circuit Court of Madison County, et al.*, 212 Ind. 1 (14, 15), 5 N. E. (2d) 641 (646, 647), all of which hold that courts always have the right to protect and enforce their own decrees and to that end retain jurisdiction over a cause. In the case at bar enforcement was left with the St. Joseph Circuit Court but the protection of the decree cannot be removed from the federal court.

POINT III.

**The Decision of the Circuit Court of Appeals That the Judgment Rendered Against a Receiver of a Street Railway Corporation for Negligence Arising in the Operation of the Property, After His Discharge and After All the Trust Property Has Been Distributed by Him, Is Not Void, Is a Decision of an Important Question of Local Law, But Is Not in Conflict With Local Law.**

The petitioners again under this point seek to have this Court hold that the respondent's judgment was void and cite in support of that proposition, three cases. In the case of *Johnson* v. *Central Trust Co.*, 159 Ind. 605, the question arose upon exceptions to a receiver's discharge. There was no question in that case concerning the effect of a reservation in a decree of foreclosure. The case of *Shepherd* v. *St. Louis Public Service Co.*, 64 Fed. (2d) 612, 615 is not contra to the case at bar as pointed out under Point I, because that Court stated the question turns upon the state law.

Throughout the appellees' brief, they have placed much reliance upon the case of *Henry* v. *Claffey*, 189 Ind. 609. In that case an answer in bar was filed to a complaint for personal injuries against a receiver setting up the discharge of the receiver, but in the instant case it specifically is disclosed that no such answer was filed to the suit of appellant. As stated by the Circuit Court of Appeals in its opinion that after chancing a trial in the state court, taking an appeal, paying all expenses and availing himself of the advantages from the delays occasioned by the appeals, he seeks now to claim the judgment is void. "A decent regard for consistency is conspicuous by its absence." Respondent's suit against the receiver proceeded to judgment, affirmed by the Appellate and Supreme Courts of Indiana, *Smith* v. *Mills*, 98 Ind. App. 543, 185 N. E. 327.

This action was not terminated by the discharge of the receiver in the Federal Court, and the transfer of the property because of the decree of the District Court in Consolidated Equity Cause No. 132, and legislative fiat found in Burns Indiana Statutes, Annotated, 1933, Sec. 2-227. Under such federal court decree and a state statute, the action of the state court was not terminated by the *discharge* of the receiver because the decree provides that liability for negligence claims not then reduced to judgment should be valid against the property. (R. 103, f.) The decree thereby specifically recognized further litigation in negligence claims, and the decree further provided: that for the purpose of enforcing the provisions of the decree, jurisdiction is retained, and the court reserved the right to retake and resell the property in case the purchaser shall fail to comply with orders of the court in respect to payment of liabilities (R. 103, g); that the property was sold free of all claims other than claims which may accrue after the entry of the decree (R. 104, h); that the purchasers or their assigns had the right to enter their appearance in this court and contest any claim or demand existing at the time of sale, and then undetermined, which would be chargeable against the property purchased (R. 104, i); and that all questions not disposed of were reserved for future adjudication (R. 105, l). Burns Indiana Statute, 1933, Sec. 2-227, provides:

> "that no action shall abate by the death or disability of a party or by the transfer of an interest therein, if the cause of action survives or continues, and in case of any other transfer of interest, the action *shall* be continued in the name of the original party or the court may allow the person to whom the transfer is made to be substituted in the action."

In the case of *Baer* v. *McCulloch*, 176 N. Y. 97, 68 N. E. 129, under approximately the same facts and a similar statute it was held that the action was not terminated by the discharge of the receiver, and the transfer of the

property so as to require the plaintiff to substitute the purchaser as defendant. The New York statute was not mandatory, as is the Indiana statute. The New York statute provides:

> "in case of transfer of interest, or devolution of liability, the action *may be* continued by or against the original parties; unless the court designates the person to whom the interest is transferred, or upon whom liability is devolved, but to be substituted in the action, or joined with the original party, as the case requires."

In *Henry* v. *Claffey,* so strongly relied upon, the effect of these transfer statutes heretofore mentioned were not determined. The cases are not similar. In the Henry case the plaintiff did not institute his action until the property had been sold under a previous order of court, and since the transfer occurred before the institution of the suit, the statute can have no application and the case, therefore, is no authority for appellees' position. Under the circumstances, as they exist in the Henry case, suit should have been instituted against the purchaser rather than the receiver, but under the circumstances as they exist in the suit at bar, appellant's action was properly instituted against the receiver at the time he was in actual operation and possession, and the only person against whom a suit could be validly filed. There is no showing in the case of *Henry* v. *Claffey* that a decree such as a decree in the case at bar, was entered. By virtue of the transfer statutes quoted, the fact that there was a transfer of interest during the pendency of the suit could not cause the action to abate. Again in *Henry* v. *Claffey,* the receiver filed his final report as such receiver, and was fully discharged from his trust before the amended complaint was filed, all of which matters were specially pleaded in the negligence case itself.

It has been repeatedly held that the Federal Court will

not relitigate the adjudication of a state court that the receiver in his official capacity was responsible for torts committed during his operations, and that the judgment against the receiver in a court other than the one appointing the receiver, conclusively establishes as against the receiver and the estate, the validity and amount of the claim; and as so cogently stated in *Central Trust Co.* v. *St. Louis A. & T. R. Co.*, 41 Fed. 551, and quoted in *Dillingham* v. *Hawk*, 60 Fed. 494, 23 L. R. A. 517 (520):

> "The right to sue the receiver in the state court would be of little utility if its judgment could be annulled or modified at the discretion of this court."

## Point IV.

**The Decision of the Circuit Court of Appeals Which Holds That a Judgment Recovered After the Discharge of the Receiver and Without Substitution of the Purchaser Is Valid Against the Purchaser, Is Not in Conflict With the Applicable Local Decision of the Supreme Court of Indiana.**

The law of this case is that the judgment of the plaintiff-respondent herein is a valid judgment. *Smith* v. *Mills*, 98 Ind. App. 543, 185 N. E. 327. At the time of the trial and at the time of the decision of that case this question certainly was in issue. The rule is that a judgment estops not only as to every ground of recovery or defense actually presented in the action, but also as to every ground which might have been presented.

*Dowell* v. *Applegate*, 152 U. S. 327, 14 Sup. Ct. 611, 38 L. Ed. 463.

*Grubb* v. *Public Utilities Commission*, 281 U. S. 470, 50 Sup. Ct. 374, 74 L. Ed. 972.

*Whitesell* v. *Strickler*, 167 Ind. 602, 78 N. E. 845.

*In re Appleman*, 176 Ind. 253, 94 N. E. 566.

*Henry, Rec.*, v. *Claffey*, 189 Ind. 609, so strongly relied upon by petitioners, has been adequately discussed under Point III and for brevity will not be further discussed at this point except to state that an answer was filed setting up the discharge in the negligence case, and there was no attempt at a collateral attack, as is being attempted in this case. Petitioners also cite the case of *National Metal Co.* v. *Greene Cons. Cooper Co.*, 11 Ariz. 108, 89 Pac. 535, but that case is not all in point because there no defense was made by the interested parties in the name of the nominal defendant as in this case. This Court has held that parties whose interests are involved and who conduct and control the defense are bound as real parties and are concluded by the judgment.

*Washington Gas Light Co.* v. *D. C.*, 161 U. S. 316 (332-333); 40 L. Ed. 712.

*Robbins* v. *Chicago*, 4 Wall. 657, 18 L. Ed. 427 (430).

*Railway Steel Spring Co.* v. *Chi. & Elkhart R. R. Co.*, 12 F. (2d) 430 (432-433).

*Wilson* v. *Brookshire*, 126 Ind. 497 (503), 25 N. E. 131 (133).

*City of Anderson* v. *Fleming*, 160 Ind. 597 (603-604), 67 N. E. 443.

*Montgomery* v. *Vicory*, 110 Ind. 211 (214), 11 N. E. 38 (40).

It is also the rule that a Federal Court will not relitigate the adjudication of a state court that the receiver in his official capacity was responsible for torts committed during his operations. *Penn General Gas Co.* v. *Penn*, 294 U. S. 189 (195), 79 L. Ed. 850 (855). *St. Louis U. T. Co.* v. *San Benito Land & Water Co.*, 4 F. (2d) 1007 (1010).

POINT V.

**The Federal District Court Did Not Lose Jurisdiction by the Appointment of a Receiver in the State Court on December 28, 1931.**

The petitioners cite five cases none of which are in point to maintain that because the property of the purchasing company was subsequently placed in receivership the Federal Courts have lost all jurisdiction. Briefly analyzed, the cases are as follows:

In *Lion Bonding Company* v. *Karatz*, 262 U. S. 77, 67 L. Ed. 871, the only question was as to jurisdiction between state and federal courts, and not as to reservation of jurisdiction.

In *Shields* v. *Coleman*, 157 U. S. 168, 39 L. Ed. 660, the receiver had been fully discharged and a bond substituted for the property. No question arose as to the retained jurisdiction in a decree such as in the case at bar.

In *Ex parte Baldwin*, 291 U. S. 610, 78 L. Ed. 1021, the petitioner sought to foreclose a right-of-way which would have affected a bankruptcy and would have the effect of ousting the bankruptcy court of jurisdiction that by the bankruptcy act had exclusive jurisdiction.

Likewise in *Field* v. *Kansas City Railway Co.*, 9 Fed. (2d) 213, no question as to reservation of power was involved, and of course action was not permitted which would interfere with possession by the receiver's court where the action was brought subsequent to the appointment of the receiver.

Jurisdiction does not depend upon actual possession of the *res*.

In the case of *In re Putnam*, 55 Fed. (2d) 73 (75), the court stated:

"Therefore the doctrine must rest upon the formal

> requisite that jurisdiction in suits *in rem* depends upon actual possession of the *res*—or power at any time to assume it—and that a scramble for possession would be an unedifying principle."

In the case of *Palmer* v. *Texas,* 212 U. S. 118 (129), 53 L. Ed. 435 (440), the Supreme Court stated that the rule is not restricted in its application to cases where property has been actually seized under jurisdiction possessed before a second suit is instituted in another court, but it often applies as well where suits are brought to enforce liens against specific property, to marshall assets, administer trusts or liquidate insolvent estates, and in suits of a similar nature where in the progress of the liquidation the court may be compelled to assume the possession and control of the property to be affected.

As we have pointed out in the authorities cited by appellees' counsel, the court either had not retained jurisdiction or the proposed appointment of a receiver was not for the purpose of aiding the court in the enforcement of its own decree. Therefore, the statements and authorities have no application to the case now before the court in the sense that appellees' counsel wishes to have it applied. It was held in *Wabash Railroad Co.* v. *Adelbert College,* 208 U. S. 35, 52 L. Ed. 379, that the exclusive jurisdiction of a Federal Circuit Court arising out of the possession of the *res* in a suit to foreclose a railroad mortgage may be continued, after the delivery of the property to the purchaser, under the foreclosure decree and the discharge of the receiver, by reserving in such decree jurisdiction over the property and claims in respect to it, and the right to take it again into possession and exercise against the power of sale, as to prevent a state court from thereafter decreeing a sale of the property to satisfy the lien of certain equipment bonds in a suit begun before the property was taken into the possession of the Federal Court. The court said:

> "It appears, therefore, that the trial and judgment in the state courts were long after the federal courts had transferred the railroad property to the purchasers under the decrees for foreclosure and had discharged the receiver. Since the federal courts had parted with the physical possession of the property, they obviously could no longer exercise an exclusive jurisdiction respecting it, unless there was something in the decree under which the property was sold and conveyed which preserved to the courts the control of the property for the purpose of giving full effect to its judgments."

The "something in the decree" which "preserved to the courts the control of the property for the purpose of giving full effect to its judgment" was a provision as follows:

> "The effect of said provisions and reservations shall be to prevent this decree operating as an additional defense to claims, if any there are, prior in right to the liens of the mortgages upon said property heretofore and hereby foreclosed, and to preserve the prior right and lien of such claims and all allowances if found and decreed to exist."

The court, in commenting on this decree, says:

> "It is obvious, therefore, that the court has parted with possession only conditionally, and that it has preserved complete control over it, and full jurisdiction over the claims which might be made against it."

The "something in the decree" which preserves to this Court the control of the property of the Chicago, South Bend & Northern Indiana Railway Company for the purpose of giving full effect to the decree of this court, is a provision much more specific than that in *Wabash Railroad Co.* v. *Adelbert College,* in the following words:

> 28. For the purpose of enforcing the provisions of this decree, jurisdiction of this cause is retained by this court, and the court reserves the right to retake and resell the property in case such purchaser or his successors and assigns shall fail to comply with any order of the court in respect to the payment of such

> principal indebtedness or liabilities within thirty days after service of a copy of such order, or if an appeal be taken from any such order within a period of twenty days after the service of notice of the entry of the order finally affirming such order on appeal.

Another provision in the decree in the case at bar was as follows:

> All liability for negligence claims not now reduced to judgment, against said Chicago, South Bend & Northern Indiana Railway Company, or against said Raymond R. Smith as receiver thereof shall be valid as against the property of said Railway Company at the sale herein ordered made to the same extent as though any judgment thereon had been recovered prior to the sale.

A clearer provision for the retention of jurisdiction to enforce such claims as that presented by the plaintiff could not have been written. It is also undisputable upon authority of *Wabash Railroad Co.* v. *Adelbert College*, 208 U. S. 37, 52 L. Ed. 379, and *Julian* v. *Central Trust Co.*, 193 U. S. 93, 48 L. Ed. 629, that this court parted with possession only conditionally and may now retake the property for the purpose of enforcing its own decree. The court first had jurisdiction of this property. This court ordered certain things done. Must this court now stand idly by and see those orders disregarded and violated? The law does not contemplate any such contempt of its orders.

The United States District Court was the first court of competent jurisdiction to take possession of the property of the Chicago, South Bend & Northern Indiana Railway Company. The property was thereby withdrawn from the jurisdiction of other courts. Especially in view of the express provision in the decree of this court retaining jurisdiction, this court should be able to control the property for the purpose of enforcing its own decree. The surrender of actual possession was only a conditional surrender. This court remains in constructive possession for the purpose of enforcing its own decree.

Petitioners have also overlooked the fact that respondent is entitled to have his claim determined in the Federal Courts. In the first place his rights arose pursuant to the decree of that Court and that the Federal Court has the exclusive right to determine respondent's rights. *Smith* v. *Missouri Pac. R. Co.,* 266 Fed. 653 (8th Cir.).

The fact that the Federal Court determines the respondent's rights does not interfere with jurisdiction of the St. Joseph Circuit Court. It has always been held that although a state court takes possession of the property of an insolvent corporation which was subject to mortgages by appointing a receiver, the Federal Court had jurisdiction of a suit to foreclose the mortgages because the foreclosing of the mortgages did not necessarily disturb the state court's possession of the property. *Brown* v. *Crawford,* 254 F. 146. This case follows *Watson* v. *Jones,* 13 Wall. 679, 20 L. Ed. 666, which certainly sustains the right of the Federal Courts to determine this controversy. See also *Byers* v. *McAuley,* 149 U. S. 607, 37 L. Ed. 867.

## Point VI.

**The Decision of the Circuit Court of Appeals Holding That Plaintiff Has a Lien on the Property Is Not in Conflict With Any Decision of This Court.**

By a long stretch of imagination or the last visage of a hope, petitioners again take the position that the foreclosure decree did not grant a lien to persons in the situation of respondent. It was so clear to the Circuit Court of Appeals that it passed the question practically without comment. *Reihl* v. *Margolias,* 279 U. S. 218, certainly is far from sustaining petitioners' position. In fact, it is directly to the contrary and sustains respondent's position because this court points out that in the determination or recognition of a prior determination of the existence and amount

of indebtedness of the defendant to creditors seeking to participate, it does not deal directly with any of the property. This is exactly the situation of the case at bar and the Circuit Court of Appeals by its opinion strictly follow that case when it did not permit the respondent to *enforce* his lien on specific property, except upon application to the court now in possession of the *res*.

Upon the question of the plaintiff's lien, that has been adequately discussed and no further elaboration is necessary.

POINT VII.

**The Girard Trust Co., Trustee, Has Had No Property Taken Without Due Process of Law.**

Girard Trust Company, Trustee, is in no position to complain because this question has become moot since the institution of this action. The Girard Trust Co., Trustee, has agreed to a Plan of Reorganization in the State Court which provides that if plaintiff has a valid lien he shall be paid in cash. (See appended certified copy of Article III of Plan of Reorganization.)

Notwithstanding, however, Girard Trust Company's lien is inferior to the plaintiff's. Plaintiff's claim arose out of the negligent operation of a street railway.

*McCullough* v. *Union Traction Co.*, 206 Ind. 585 (600-603), 186 N. E. 300 (306) holds that such a judgment is prior even to pre-existing mortgages. That case and *Citizens Trust Company* v. *National Equipment Company*, 178 Ind. 167 (171), 98 N. E. 865 (866) approve the following statement:

> "It is said that 'every railroad mortgagee in accepting his security impliedly agrees that the current debts made in the ordinary course of business shall be paid from the current receipts before he has any claim on the income.' "

These cases are well reasoned and the Law of Indiana.

The reason for these rules are apparent in this case. $125,000 was paid to the Girard Trust Company; over $415,000 was spent on the line; and over $153,000 was turned over to the purchasing company—all arising from the receiver's operations. Damages incurred in the operation of a railroad in the hands of a receiver are generally considered operating expense. *McCullough* v. *Union Traction Co.*, 206 Ind. 585 (589), 186 N. E. 300 (305); *Brown* v. *Winterbottom*, 98 Ohio St. 127, 120 N. E. 292 (295). Notwithstanding this rule and these facts, the mortgagees and mortgagors seek and have been permitted to benefit from the income to the tune of over $675,000. They seek to hold these funds and the security free from all tort claimants. We submit that such result is not only without equity but directly contrary to authority.

**Conclusion.**

Petitioners have been unable to show wherein the decision of the Circuit Court of Appeals, complained of herein, is in any way contrary to or out of harmony with any ruling precedent of or any principle of law declared by any other Circuit Court of Appeals, this Court or the Courts of Indiana.

We have analyzed in this brief all the authorities cited by the petitioners in support of their application for writ of certiorari. These authorities include those relied upon by petitioner when the appeal was pending in the Circuit Court of Appeals. So irresistible are the facts and so well established and universally recognized are the rights in support of and involved in respondent's position and the principles of law applicable to the facts that the Circuit Court of Appeals in its clearly stated and logically reasoned opinion did not find it necessary to cite any precedent to support its irrefutable conclusions.

The authorities cited by petitioners in the brief in support of the writ of certiorari in addition to those relied upon in applicant's briefs on the appeal in the Circuit Court

of Appeals are so inapplicable and beyond the points involved that they indicate the weakness and untenableness of their position and irresistably leads to the conclusion as it did the Circuit Court of Appeals in its decision, which is being attacked, that the petitioners are still pursuing their condemnatory delay. The Circuit Court of Appeals chronologized the events chief of which some are:

Plaintiff's injury occurred February 19, 1928;

Suit instituted within four and one-half months;

Judgment of $12,500 recovered on December 22, 1930;

Judgment affirmed by Indiana Appellate Court April 26, 1933;

Motion to transfer denied Indiana Supreme Court April 26, 1934;

Suit to establish lien in U. S. District Court February 14, 1936;

Lien confirmed by Circuit Court of Appeals on January 22, 1940;

Petition for rehearing denied January 28, 1940.

Then the Court added these significant words which not only the above but subsequent events warrant:

> "While the time which these appeals have taken is quite nonunderstandable in this day when the law's delays have been so successfully overcome in other jurisdictions, we assume, and we are quite certain, that the delays were not all attributable to the courts. Experience has demonstrated that the art of postponement is highly developed by many in the legal profession and when well practiced is almost as effective as a good, valid defense."

We respectfully submit the petition should be denied.

Respectfully submitted,

ROBERT A. GRANT,
*Attorney for Respondent.*

LOUIS M. HAMMERSCHMIDT,
MILTON A. JOHNSON,
*Of Counsel.*

# APPENDIX.

STATE OF INDIANA, }
ST. JOSEPH COUNTY. } ss.

I, Frank J. Bruggner, Clerk of the St. Joseph Circuit Court within and for the County of St. Joseph and State of Indiana, do hereby certify that the following is a full, true, complete and correct copy of Article III and footnote thereto of Plan of Reorganization as approved on May 29, 1939, in cause No. 56793 (Consolidated) and entitled Chemical Bank & Trust Company *et al. vs.* Northern Indiana Railway, Inc., *et al.*, to wit:

## III.

**Claims Not Affected by the Plan, Liabilities and Obligations, Including Executory Contracts of the Receiver.**

Claims of the United States for taxes and claims of the States of Indiana and Michigan, to the extent that such claims shall not have been paid by the Receiver, are to be paid in cash or assumed by the New Company on Consummation of the Plan. (The Plan shall be deemed consummated when new securities are available for distribution pursuant to the Plan, and the term "Consummation of the Plan" shall refer to that event; the term "New Company" referred to herein being the corporation in which will be vested the assets of the Old Company pursuant to the Plan.)

All contracts of the Old Company which are executory in whole or in part and which shall have been affirmed or adopted by the Receiver, and all contracts, liabilities and obligations of the Receiver (including taxes) will, to the extent not performed or otherwise discharged before the

Consummation of the Plan, become contracts, liabilities and obligations of the New Company, unless otherwise provided in the foreclosure decree or other order of the court.

All equipment obligations of the Old Company, if any, in existence on the date of the Consummation of the Plan, and all equipment obligations of the Receiver on that date will be assumed by the New Company.

Holders of Preferred Claims against the Old Company, if any, as determined by the court, shall be paid the amount thereof in cash upon Consummation of the Plan.

Claims referred to in this Article are deemed not affected by the Plan.*

* On February 14, 1936, Abbott L. Mills filed suit in the United States District Court for the Northern District of Indiana, alleging that he has recovered a judgment for $12,500.00 and interest against Chicago, South Bend and Northern Indiana Railway Company and its receiver, asserting that the judgment was a lien against the property of Northern Indiana Railway, Inc. and praying enforcement of his alleged lien. On November 18, 1938, said United States District Court entered judgment, dismissing the suit for want of jurisdiction. If an appeal is taken and further if the plaintiff's alleged lien is sustained, it will be paid in cash under the provisions of Article III. Hence said claim is not deemed affected by the Plan.

as the same appears upon the record of said County and in my custody as Clerk.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed the Seal of said Court this 26th day of September, 1940.

FRANK J. BRUGGNER,
*Clerk.*

(SEAL)

By MARIE SNIADECKI,
*Deputy.*